
**APPEALS BOARD
UTAH LABOR COMMISSION**

CLAUDIA CURTIS,

Petitioner,

vs.

ALBERTSONS,

Respondent.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 04-1119

Claudia Curtis asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Lima's denial of Ms. Curtis's claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Ms. Curtis claims workers' compensation benefits from Albertsons for neck and back injuries allegedly sustained from three separate work accidents occurring on December 12, 1999, October 16, 2000, and March 29, 2001. Due to conflicting medical opinions as to medical causation and Ms. Curtis's claim for permanent total disability, Judge Lima appointed a medical panel. After reviewing the panel's opinion, Judge Lima adopted the panel's findings and awarded medical expenses and travel reimbursement related to Ms. Curtis's neck injury; however, she denied permanent total disability benefits after finding that Ms. Curtis could perform other work reasonably available and that none of the work accidents were the direct cause of her alleged disability.

In her motion for review, Ms. Curtis argues that she is entitled to permanent total disability benefits based on her testimony that showed she cannot perform other work reasonably available and her work injuries are the direct cause of her disability.

FINDINGS OF FACT

The Appeals Board adopts Judge Lima's findings of fact in so far as they are consistent with this decision. The facts relevant to the motion for review, as supplemented by the record, are as follows:

Ms. Curtis worked for Albertsons as an assistant production baker. Ms. Curtis first injured her neck on December 12, 1999, when she was pulling a box of baguettes off a 6-foot high cart and the box hit the side of her head. She was diagnosed with an axial compression neck injury and

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received physical therapy through February 2000. On October 16, 2000, Ms. Curtis tripped on a box and fell down on her hands and knees. She was diagnosed with a lumbar strain and exacerbation of neck pain and received physical therapy through January 2001. On March 29, 2001, Ms. Curtis was attempting to stack a 30-pound box on top of a pallet when the box fell and, although she attempted to avoid the impact by twisting her body away, it hit the right side of her neck and shoulder. She complained of severe neck and low back pain at Workmed and was diagnosed with a cervical and lumbar strain. She has not worked for Albertsons since that date.

Dr. Bowen began treating Ms. Curtis in April 2001 and initially restricted her to sedentary work with no lifting over five pounds or above the shoulder. Following review of an MRI, Dr. Bowen diagnosed sub-acute diffuse myofascial pain and sub-acute neck pain and disc herniation at C6-7 and recommended physical therapy through May of 2001. Ms. Curtis also received additional physical therapy in July 2002. By September 23, 2002, Dr. Bowen found Ms. Curtis had reached maximum medical improvement (MMI) for the March 2001 work injury. He recommended a sedentary work classification and released her to a six-month wellness program. Dr. Bowen later assessed Ms. Curtis with a 7% whole person impairment for her neck and a 5% whole person impairment for her lower back.

On November 22, 2002, Ms. Curtis underwent a functional capacity evaluation with Mr. Kurt Dudley, who noted Ms. Curtis was generally over-reactive to the physical examination, she had some inconsistent testing, and there was "some exaggeration in her overall symptom complex." He classified her in the sedentary job category. He also found no evidence of nerve root impingement.

Ms. Curtis continued to see Dr. Bowen through 2003, wherein her condition was noted as stable, but, because she complained that the chronic pain persisted, in April 2003 she was referred for an additional six months to a wellness program. Also in early 2003, Ms. Curtis began medical transcription training through vocational rehabilitation; however, while attempting to take the final examination in May 2003, she claimed severe pain and did not complete the second day of testing.

On October 8, 2003, another MRI was taken that showed Ms. Curtis's left posterolateral disc herniation at C6-7 was markedly improved. On October 29, 2003, Mr. Dell Felix conducted a functional capacity evaluation and noted that Ms. Curtis's manual dexterity tests were at a competitive rate but that she would not stay sitting or standing longer than 10 minutes at a time. Mr. Felix found that, based Ms. Curtis's subjective behavior during testing, she would not qualify for a sedentary work classification; however, he noted that Ms. Curtis appeared to magnify her symptoms.

In February 2004, Ms. Curtis was in a car accident and complained that her neck and back pain flared up but later returned to baseline. On April 19, 2004, at Albertsons' request, Dr. Knoebel examined Ms. Curtis and diagnosed nonspecific neck, back and extremity pains without verifiable radiculopathy and with significant pain amplification. He found that Ms. Curtis's complaints were initially caused by the work accidents but that her continuing complaints of pain did not correlate to the work injuries and were therefore not medically caused by the work accidents. He found no

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permanent impairments or restrictions necessitated by her work injuries. Mr. Dell Felix conducted another functional capacity evaluation on July 27, 2004, with similar results as before, noting that Ms. Curtis demonstrated high pain behavior and possible magnification of her symptoms.

At the hearing, Ms. Curtis testified to working at a sedentary work capacity from March 2001 through early 2002, making sales calls to schedule appointments. However, because her pain level made her miss work and she was unable to concentrate, she was fired.

Judge Lima did not find Ms. Curtis's testimony about her ability to work was credible. Albertsons' vocational expert, Mr. Evertson, indicated there were several sedentary positions that Ms. Curtis would be qualified for, taking into account her permanent restrictions.

The medical panel reviewed the medical evidence and conducted a two-hour examination of Ms. Curtis. The panel found that as a result of the work accidents, Ms. Curtis sustained a large herniated cervical disc at C6-7 that markedly improved according to a subsequent MRI. The panel found that Ms. Curtis's current neck condition, while exaggerated, was caused by the work accidents. The panel, however, did not find that Ms. Curtis's current low back condition was caused by any of the three work accidents based on her prolonged lumbar complaints of pain and a non-credible examination. The panel also found that the MRI findings did not correlate with a work injury on any of those dates. The panel stated she may have initially suffered low back injury but that she reached medical stability for this injury and her neck injury by January 10, 2003, and no further medical treatment would be required. On the issue of Ms. Curtis's physical limitations, the panel stated:

The panel members agree that the limitations are self imposed. Her level of pain cannot be measured and even efforts such as the functional capacity evaluation cannot overcome the subjectivity in this assessment. There are some credibility issues on her examination We believe that the expressions of pain are exaggerated and further agree that on the basis of reasonable medical probability that she could be employed in a sedentary occupation.

DISCUSSION AND CONCLUSIONS OF LAW

The primary issue before the Appeals Board is whether Ms. Curtis is entitled to a preliminary award for permanent total disability compensation. Under § 34A-2-413 of the Utah Workers' Compensation Act, Ms. Curtis would be entitled to such an award provided that she establishes that (1) she sustained a significant impairment or combination of impairments as a result of the work accidents; (2) she is permanently totally disabled pursuant to a four-part test under subsection 413(c); and (3) the work accidents directly caused her disability.

Judge Lima initially found that Ms. Curtis qualified for sedentary work. She then found that Ms. Curtis could perform other work reasonably available—thus failing to satisfy one of the

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elements of the four-part test for showing she is permanently and totally disabled. Judge Lima also found that the work accidents did not directly cause Ms. Curtis's alleged disability. Therefore, she denied permanent total disability compensation.

In her motion for review, Ms. Curtis contends that Albertsons failed to provide any evidence that showed the suggested jobs were actually in existence, that the employers would accommodate Ms. Curtis's restrictions, or that the employers would hire her. Rather, Ms. Curtis asserts that through her own testimony she established that she is unable to maintain sedentary work. To support her argument, Ms. Curtis relies on the Court of Appeals' decision in Martinez v. Media-Paymasters Plus, 117 P.3d 1074 (Utah App. 2005), which held that the Commission had abused its discretion in finding work was reasonably available under similar circumstances. However, following the briefing in this case, the Utah Supreme Court reversed that decision. See Martinez v. Media-Paymasters Plus, 164 P.3d 384 (Utah 2007). The Utah Supreme Court clarified that the burden of proof for showing entitlement to permanent total disability is on the employee, not the employer.

The Appeals Board has reviewed the record and finds that Ms. Curtis did not meet her burden of proof that she could not perform other work reasonably available. Without any more proof than her own self-serving testimony, she argues the evidence weighs in her favor, despite Albertsons' evidence of jobs available to her based on the testimony of a vocational expert and the medical panel's persuasive finding that she could work in a sedentary occupation. The Appeals Board finds that Ms. Curtis can perform other work reasonably available and therefore is not permanently and totally disabled. Because Ms. Curtis has not met the second requirement in order to qualify for a preliminary award of permanent total disability compensation, the Appeals Board finds it unnecessary to review Ms. Curtis's remaining argument of direct causation.

In summary, the Appeals Board finds that Ms. Curtis can perform other work reasonably available and affirms Judge Lima's decision dismissing with prejudice Ms. Curtis's claim for permanent total disability compensation.

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ORDER

The Appeals Board affirms Judge Lima's decision. It is so ordered.

Dated this 21st day of January, 2009.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.